IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.645 OF 2005

IN

SUIT NO.550 OF 2005

Chembur Venus Co-op.Housing Society Ltd. ...Plaintiff.

Vs.

Nensee Constructions Pvt. Ltd. & others. ...Defendants.

Mr.Rajeev Kumar i/b. P.S.Shah, for Plaintiff.

Mr.Snehal Shah i/b. N.Shah & Himaytullah, for Defendants 1 to 3.

Mr.J.Shukla i/b. G.H.Shukla & Co. for Defendant no.4.

CORAM: D.K.DESHMUKH, J.

DATED: 25th April,2006

P.C.:-

1. This is a notice of motion taken out by the plaintiff. The plaintiff has filed the suit seeking several reliefs, but the relief which is relevant for the purpose of deciding this notice of motion is in relation to Flat no.101 on 10th floor of the building owned by the plaintiff Society. Admitted position is that the defendant no.1 was engaged by the plaintiff Society to construct 7th, 8th, 9th and 10th floor of the building of the society. The 7th floor is a dummy floor. There are flats on 8th, 9th and 10th floor. According to the plaintiff-Society, the defendant no.1 was given a power of attorney by the Society to sell the flats constructed on 8th and 9th floors. So far as flats on 10th floor are concerned, there was no power of attorney given by the society. There were two flats on the 10th floor i.e. flat no.101 and 102. It is a common ground before me that flat no.102 has been transferred by the defendant no.1 with the consent of the Society. There is no dispute about the flat no.102. The dispute is about

flat no.101. According to the plaintiff, the defendant no.1 has transferred the flat to defendant no.2 who is a Director of defendant no.1 and the agreement is signed on behalf of the plaintiff society by defendant no.2 posing himself as a power of attorney holder of the plaintiff society. The power of attorney, however, on the basis of which the flat is transferred, appears to authorise the defendant no.1 to transfer the flat only on the 8th and 9th floor. There is no document on record which can be styled as the power of attorney which appoints the defendant no.1 as attorney of the plaintiff to transfer flat no.101. Therefore, prima facie it appears that the alleged transfer of flat no.101 in favour of defendant no.2 is unauthorised. The defendant no.2 who is admittedly in possession of the flat has undertaken before me that the defendant no.2 shall not, without seeking leave of the Court, transfer, alienate, create third party rights or part with possession of flat no.101. He has also undertaken to file a written undertaking to that effect within a period of one week from today. The defendant no.2 has also undertaken to pay to the

Society, the society charges as may be demanded by the Society without prejudice to his right to challenge the correctness of the amount claimed by way of society charges.

2. It appears from the record that there is no valid authority in favour of defendant no.1 to transfer flat no.101, which admittedly belongs to the plaintiff-society, to the defendant no.2. It appears from the agreement between defendant no.1 and defendant no.2 that the defendant no.1 has received amount of Rs.43,00,000/- from the defendant no.2. In my opinion, therefore, as the flat admittedly belongs to the plaintiff society, it will be appropriate to direct the defendant no.1 to deposit that amount in the Court. Taking overall view of the matter therefore, in my opinion, the following order would meet the ends of justice:-

(i) The defendant no.2 to file an undertaking in this Court within a period of one week from today, undertaking therein not to transfer, alienate or create third party rights or part with possession of

the flat no.101 on 10th floor of the building of the plaintiff society, without seeking leave of the Court.

(ii) The defendant no.2 is directed to pay to the society the outgoings and the other charges within a period of two weeks from the date on which the bill for those charges is served by the plaintiff society on defendant no.2. The bill for society charges will be served by the plaintiff without prejudice to its rights and contention and the payment shall be made by defendant no.2 to the Society without prejudice to his rights and contention to challenge his liability to pay the said amount and also to challenge the correctness of the amount which is demanded.

(iii) The defendant no.1 shall within a period of Eight weeks from today, deposit in this Court amount of Rs.43,00,000/- (Rupees Forty Three lakhs only) with due notice to the plaintiff. On amount being deposited, it shall be invested by the Prothonotary and Senior Master of this Court, in

fixed deposit in a nationalised Bank, during the pendency of the suit.

(iv) In case the defendant no.1 fails to deposit the amount as directed above within the aforesaid period, then this notice of motion shall stands granted in terms of prayer clause (b).

The notice of motion is disposed of.